STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Peter D. O'Connell, Presiding

NORTHERN AMERICAN BROKERS, LLC, a Michigan limited liability company, and MARK RATLIFF, an individual,

Plaintiffs/Appellees,

v

HOWELL PUBLIC SCHOOLS, a Michigan general powers school district;

Defendant/Appellant,

and ST. JOHN PROVIDENCE, a Michigan corporation,

Defendant.
_____/

Supreme Court No. 155498

COA Docket No. 330126

Lower Court Case No. 15-028669-CH

MICHIGAN REALTORS'® AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT'S APPLICATION

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STATEMENT IDENTIFYING THE ORDER APPEALED FROM AND RELIEF SOUGHT

This case involves the Court of Appeals' erroneous validation of an alleged agreement to pay a commission contrary to the statute of frauds, MCL 566.132(1)(e). Plaintiffs/Appellees, North American Brokers, LLC ("NAB") and Mark Ratliff ("Ratliff") (collectively, "Plaintiffs"), filed this action to recover a commission they claim to be owed from the sale of real property located in Livingston County, Michigan (the "Property"), against the seller, Defendant/Appellant, Howell Public Schools ("Howell") and the buyer, St. John Providence ("SJP").[1]

Howell filed an Application for Leave to Appeal (the "Application") with this Court from the February 9, 2017 Opinion of the Court of Appeals (the "COA Opinion") in which the Court of Appeals reversed the decision of the Livingston County Circuit Court, granting summary disposition in favor of Howell and, in relevant part, dismissing Plaintiffs' promissory estoppel claim.[2] A copy of the COA Opinion is attached as Exhibit A. The Court of Appeals then remanded the case to the Circuit Court "for proceedings on [the promissory estoppel] claim." The Application, which Amicus Curiae supports, seeks reversal of the COA Opinion which reversed the Circuit Court's grant of summary disposition dismissing Plaintiffs' promissory estoppel claim.

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[1] SJP was dismissed from this lawsuit on October 23, 2015 and, therefore, is not a party to this appeal.

[2] The dismissal of Plaintiffs' claims for quantum meruit, negligent misrepresentation, procuring cause and breach of contract was not appealed by Plaintiffs.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED BY REVERSING THE CIRCUIT COURT'S GRANT OF SUMMARY DISPOSITION IN FAVOR OF DEFENDANT ON PLAINTIFFS' PROMISSORY ESTOPPEL CLAIM FOR PAYMENT OF A COMMISSION BASED ON THE STATUTE OF FRAUDS:

A. WHERE THE STATUTE CLEARLY AND UNAMBIGUOUSLY PROHIBITS A PROMISSORY ESTOPPEL EXCEPTION TO ITS APPLICATION?

B. WHERE, CONTRARY TO THE CONCLUSION OF THE COURT OF APPEALS, THIS COURT'S PRECEDENT DID NOT REQUIRE THAT IT REVERSE THE DECISION OF THE CIRCUIT COURT?

C. WHERE THE PROMISSORY ESTOPPEL CLAIM, AS PLEAD, FAILED TO STATE A CLAIM UNDER MICHIGAN LAW AND EQUITY?

The Court of Appeals answered: "No."

The Circuit Court answered: "Yes."

Plaintiffs/Appellees answer: "No."

Defendant/Appellant answers: "Yes."

Amicus Curiae answers: "Yes."

II. WHETHER THE COURT OF APPEALS OPINION IS CONTRARY TO PUBLIC POLICY CONCERNS?

The Court of Appeals answered:	"No."
The Circuit Court answered:	"Yes."
Plaintiffs/Appellees answer:	"No."
Defendant/Appellant answers:	"Yes."
Amicus Curiae answers:	"Yes."

I. INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Realtors® (the "Association") is Michigan's largest non-profit trade association, comprised of 47 local boards and a membership of more than 28,000 appraisers, brokers and salespersons licensed under Michigan law. Each day, the Association's members are involved in hundreds of real estate transactions, many of which involve brokers and salespeople entering into agreements for the payment of a commission upon the sale of real property. Michigan law, specifically the statute of frauds, unambiguously requires that such agreements be in writing and signed by the person agreeing to pay the commission. In accordance with Michigan law, Michigan Realtors® are educated and taught to get commission agreements in writing and signed by the party to be charged. This training is then carried over into their daily business practices and built into the various multiple listing services operation in Michigan. This rigorous adherence to the law promotes stability and consistency in the business practices of Realtors® and, at the same time, promotes the protection of property buyers and sellers from fraudulent commission claims.

One of the goals of the Association is to promote good and cohesive business practices in the real estate industry. Requiring written and signed commission agreements promotes this goal. Accordingly, the present case involves issues which are not only significant to this State's jurisprudence, but also to the Association and its members. The issues in this appeal include some of the most basic, yet significant statutory interpretation and principles as applied to Realtors®. For these reasons, the Association and its members have a significant interest in the outcome of this case.

The Court of Appeals held that the Circuit Court erred by granting summary disposition in favor of Howell on Plaintiffs' promissory estoppel claim as being barred by the statute of frauds.

COA Opinion, p 4, Exhibit A. This ruling is erroneous. Under basic principles of statutory construction, the statute of frauds bars claims for commissions that are not evidenced in writing and signed by the person paying the commission. Further, under this State's jurisprudence, this legal principle is not changed by the simple pleading of a claim for promissory estoppel as opposed to breach of contract, quantum meruit, misrepresentation and the like.

The Association believes that this is a case that is important to the public interest and that the outcome of this case is of vital concern to the Association, its members and consumers. The Association's experience and expertise could be beneficial to this Court in the resolution of the issues presented by this appeal. In *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . ." The Association, therefore, seeks leave to file this brief amicus curiae in support of the Application of the Defendant/Appellant.

II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The Association adopts the Statement of Facts set forth in Howell's Application, as highlighted by the following:

1. According to Plaintiffs, they became aware that Howell was selling the Property when they saw Howell's for sale by owner sign (the "Sign") on the Property.

2. The Sign stated that the Property was for sale and was "broker protected."

3. Howell never signed an agreement with Plaintiffs to assist in the sale of the Property.

4. The Property was at all times for sale by owner.

5. SJP, the buyer, also refused to form a relationship with Plaintiffs.

a. In fact, although Plaintiffs informed SJP that the Property was for sale and scheduled a site inspection with SJP at the Property, SJP did not appear at the inspection.

b. And, while Plaintiffs sent SJP a letter of intent which they requested SJP execute and return in order to establish a relationship, SJP refused to do so.

6. Almost simultaneously, Plaintiffs sent Howell a "Confidentiality, Commission & Broker Protection Agreement" ("NAB Proposal") by e-mail in order to attempt to establish a relationship with Howell and bring SJP forward as a buyer. Howell never signed the NAB Proposal and notified Plaintiffs on December 10, 2013 that Howell's legal counsel opposed the NAB Proposal in its entirety.

7. Although Plaintiffs represented to Howell that in SJP, they had a buyer who was ready, willing and able to purchase the Property, Plaintiffs did not actually provide a ready, willing and able buyer for the Property because SJP refused to contract and do business with Plaintiffs.

8. Therefore, Howell refused Plaintiffs' demand to be paid a commission.

9. A commission was paid to another broker when SJP purchased the Property.

10. Plaintiffs filed this lawsuit asserting that they are entitled to a commission for SJP's purchase of the Property. Plaintiffs base this assertion on the fact that the Sign on the Property included the words "broker protected." Plaintiffs claim that these words induced Plaintiffs to believe that they would be entitled to a commission on the sale of the Property if they provided Howell with a buyer for the Property.

11. Plaintiffs' complaint asserted the following claims: (1) promissory estoppel; (2) quantum meruit; (3) negligent misrepresentation; (4) procuring cause; and (5) breach of contract.

12. Howell filed a motion to dismiss pursuant to MCR 2.116(C)(7) and (8). In relevant part, Howell asserted that, based on Michigan's statute of frauds, MCL 566.132, Plaintiffs failed to state a claim against Howell because Plaintiffs admitted that there was no written and signed agreement between Plaintiffs and Howell for the payment of a commission on the sale of real property ("Howell's SD Motion").

13. On October 15, 2015, the Livingston County Circuit Court granted Howell's SD Motion. In relevant part, the Circuit Court found that the statute of frauds barred Plaintiffs' promissory estoppel claim.

14. On November 12, 2015, Plaintiffs filed a claim of appeal with the Michigan Court of Appeals, asserting that the Circuit Court incorrectly granted Howell's SD Motion because: (1) a promissory estoppel claim is not barred by the statute of frauds; and (2) alternative, there is a writing (the Sign) sufficient to entitle Plaintiffs to a commission from Howell.

15. The Court of Appeals reversed the Circuit Court's grant of summary disposition as to its promissory estoppel claim, stating that it was bound by the precedent of this Court to hold that application of the statute of frauds was suspended as to Plaintiffs' promissory estoppel claim. COA Opinion, pp 3-4, Exhibit A.

III. ARGUMENT

A. Standard of Review

This Court's review of this matter is *de novo.* A decision to deny or grant summary disposition as well as issues of statutory interpretation and application are all reviewed *de novo.*

Dressel v Ameribank, 468 Mich 557, 561; 664 NW2d 151 (2003); *McJunkin v Cellasto Plastic Corp,* 461 Mich 590, 596; 608 NW2d 57 (2000).

As to summary disposition motions brought pursuant to MCR 2.116(C)(8), all well-pleaded factual allegations are taken as true. However, unsupported statements of legal conclusions are insufficient to state a cause of action. *Kyocera Corp v Hemlock Semiconductor, LLC,* 313 Mich App 437, 445; 886 NW2d 445 (2015); *Estate of Maki v Coen*, 318 Mich App 532, 538; 899 NW2d 1111 (2017).

B. The Statute of Frauds Clearly and Unambiguously Prohibits a Promissory Estoppel Exception to Its Application

The statute of frauds requires that certain types of agreements be in writing and signed by the party to be charged before they can be enforced. *Crown Tech Park v D&N Bank, FSB,* 242 Mich App 538, 548; 619 NW2d 66 (2000). As its title suggests, the purpose for which the statute of frauds has been adopted by virtually every state in the nation is to protect against fraud and perjury. *Black's Law Dictionary* (6th ed), p 595. Michigan's statute of frauds, as relevant here, provides:

> (1) In the following cases an agreement, contract, or **promise** is void unless that agreement, contract, or **promise,** or a note or memorandum of the agreement, contract, or **promise** is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or **promise:**
>
> * * *
>
> (e) An agreement, **promise,** or contract to pay a commission for or upon the sale of an interest in real estate.

MCL 566.132(1)(e) (emphasis supplied) (the "Commission Provision"). This statutory language does not provide an express exception for claims for promissory estoppel. Nor, as discussed below,

does this statutory language support a judicially created exception for claims for promissory estoppel. Rather, the plain unambiguous language of the Commission Provision actually precludes claims for promissory estoppel.

1. The Plain Language of the Statute of Frauds Precludes an Exception for Promissory Estoppel

The "goal in interpreting a statute is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Bank of America, NA v First American Title Ins Co,* 499 Mich 74, 85; 878 NW2d 816 (2016); *Kiesel Intercounty Drain Drainage Dist v Dep't of Natural Resources*, 227 Mich App 327, 334; 575 NW2d 791 (1998). If the statute is unambiguous on its face, the Court simply enforces the statute as written. *Id.* In doing so, the Court "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016). "[W]ords and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole," and "a word or phrase should be given meaning by its context or setting." *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014), quoting *People v Couzens*, 480 Mich 240, 249-250; 747 NW2d 849 (2008).

More specifically, with respect to the statute of frauds, because "the general statute had no application to [a] promise [made] to a real estate broker to pay him for negotiating a sale or purchase of land," the Commission Provision of the statute is in derogation of common law and, therefore, must be strictly construed. *Stephenson v Golden*, 279 Mich 710, 753; 276 NW 869 (1937).

> Before the enactment of subdivision 5 of section 13417 above, the general statute of frauds had no application to the promise to a real estate broker to pay him for negotiating a sale or purchase of land. In such case, the broker has no interest in the land either

> before or after the transaction, the promise being merely one to pay for work and labor. 2 Reed on Statute of Frauds, §756, citing many cases; 29 Am & Eng Enc of Law, 2d Ed, p 802, and cases cited; Wood on Statute of Frauds, §16. **The provisions of subdivision 5 of section 13417, 3 Comp Laws 1929, are in derogation of the common law and to be strictly construed.**

Id. (emphasis supplied). See also, *Summers v Hoffman*, 341 Mich 686, 694; 69 NW2d 198 (1955) (The statute of frauds provision relating to agreements to pay commission upon sale of real estate is in derogation of common law and must be strictly construed. Comp Laws 1948, §566.132, subd 5).

Thus, in *Smith v Starke*, 196 Mich 311; 162 NW2d 998 (1917), this Court held that oral agreements to pay a commission for procuring a purchaser on the sale of land were void under the plain language of the statute of frauds and that the courts of this State were without authority to add words of limitation by judicial construction. This Court stated:

> Without qualification, [the Legislature] declared void 'every agreement . . . to pay any commission.' The Legislature having failed to use the words of limitation, we cannot add them by judicial construction. Where the legislative expressions are obscure, the courts may construe a statute, giving a reasonable and sensible interpretation thereto, but where the statute is plain and unambiguous in its terms, its construction is not for the courts; the courts have nothing to do but obey it. *In re Klein's Estate,* 152 Mich 420; 116 NW 394.

Id. at 314-315 (emphasis supplied). See also, *Summers*, 341 Mich at 695 ("There are no words of limitation contained in [the Commission Provision]").

In relevant part, the plain language of §1 of the statute of frauds renders void any "agreement, contract or promise" to "pay a commission for or upon the sale of an interest in real estate that is not in writing and signed by the party to be charged." MCL 566.132(1)(e).

The statute does not void only agreements and contracts. The statute expressly voids "promises" that are not in writing and signed by the party to be charged as well. In fact, the Commission Provision uses the word "promise" to describe the items it renders void five (5) times. Therefore, the creation of an exception to the statute of frauds based on a "promise" is in direct conflict with the unambiguous language of §1 of the statute of frauds – a statute which, as a matter of law, is to be strictly construed. *Stephenson*, 279 Mich at 753.

In addition, the creation of a promissory estoppel claim exception to the operation of the statute of frauds renders the words "promise" in the statute nugatory – mere surplusage. In fact, the creation of a promissory estoppel claim exception to the operation of the statute of frauds renders the entire Commission Provision nugatory – mere surplusage. There is simply no preclusive effect with respect to oral or unsigned commission agreements, contracts or promises if the statute of frauds can be circumvented by merely alleging promissory estoppel. The whole point of having the Commission Provision, and having commission agreements, contracts and promises in writing and signed is to avoid fraudulent claims and perjury. *Black's Law Dictionary* (6th ed), p 595. The object of the statute is thus subverted, undermined and negated by the judicially created promissory estoppel exception. Accordingly, promissory estoppel claims, based on a promise to pay a commission which is insufficient to meet the criteria of the statute of frauds, should not be permitted under Michigan law.

2. The Court of Appeals Erred in Its Comparison of the Language of the Various Sections of the Statute of Frauds

The Court of Appeals rejected the application of the *Crown Tech Park* case, *supra*, to this case. COA Opinion, p 3, Exhibit A. This rejection was erroneous. The *Crown Tech Park* case and this case have significant parity.

The *Crown Tech Park* case involved a recent amendment to the statute of frauds; specifically, subsection 2 of MCL 566.132, pertaining to promises and commitments made by financial institutions. *Crown Tech Park*, 242 Mich App at 549. That subsection provides:

> (2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
>
> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
>
> (c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

MCL 566.132(2).

The *Crown Tech Park* Court held that promissory estoppel claims were precluded based on the unambiguous language of the statute specifically barring "an action." *Crown Tech Park*, 242 Mich App at 550. The *Crown Tech Park* Court read this language to be "unqualified and a broad ban." *Id.* The *Crown Tech Park* Court took note of the "generic and encompassing" language used to describe the types of oral "promises or commitments" proscribed by the statute

of frauds as being consistent with interpreting subsection 2 to preclude all actions – including actions based on promissory estoppel. *Id.*

The Court of Appeals in this case held that the *Crown Tech Park* case did not apply here because subsection 1 of the statute of frauds "does not contain the same mandatory language," barring "any" action, as does subsection 2. COA Opinion, p 3, Exhibit A. Admittedly, subsection 1 does not contain language barring "any action."[3] However, subsection 1 need not contain that precise language to be equally effective as subsection 2 at barring claims for promissory estoppel. Instead of barring "an action," subsection 1 provides for the functional equivalent by making any oral, unsigned agreement, contract or promise to pay a commission "void."

As a matter of law, an agreement, contract or promise that is void is incapable of supporting "an action." Therefore, declaring an agreement, contract or promise void is the same thing as saying that no action can be maintained on that agreement, contract or promise. As stated by this Court:

> "Void" is defined as: "[n]ull; ineffectual; nugatory; having no legal force or binding effect . . . ." *Black's Law Dictionary* (6th ed). "Void contract" is similarly defined as: "[a] contract that does not exist at law; a contract having no legal force or binding effect . . . . [S]uch contract creates no legal rights and either party thereto may ignore it at his pleasure, insofar as it is executory." *Id.*

Epps v 4 Quarters Restoration LLC, 498 Mich 518, 537; 872 NW2d 412 (2015) (emphasis supplied). By contrast, a

> "voidable contract" is defined as: "[a] contract that is valid, but which may be legally voided at the option of one of the parties . . . . One which can be avoided (cancelled) by one party because a right

[3] Technically, however, neither does subsection 2. The precise language from subsection 2 bars "an action." Similarly, subsection 1 bars "an . . . promise."

> of rescission exists as a result of some defect or illegality (*e.g.*, fraud or incompetence)."

Id. at 538 (citations omitted).

In sum, the Commission Provision of the statute of frauds uses the word "void" to describe the disposition of all oral and/or unsigned agreements, contracts and promises to pay a commission. The statute does not describe the agreements, contracts and promises as merely voidable. As a result, oral and/or unsigned agreements, contracts and promises to pay a commission are a "nullity from the outset," which cannot "as a matter of law grant any authority" upon which to bring a lawsuit. *Id.* at 538-539. A void agreement, contract and/or promise simply creates no legal rights and, thus, bars "any action." The *Crown Tech Park* decision is compatible with this case and supports the exclusion of promissory estoppel claims under the Commission Provision.

C. This Court's Precedent Did Not Require the Court of Appeals' Reversal of the Decision of the Circuit Court

The Court of Appeals held that it was constrained by this Court's precedent to reverse the Circuit Court's grant of summary disposition on Plaintiff's promissory estoppel claim. COA Opinion, pp 3-4, Exhibit A. For the reasons discussed below, this is not true.

1. Historically, the Statute of Frauds has been Applied by Michigan Courts to Bar <u>All</u> Oral and/or Unsigned Claims for a Commission

Beginning directly after its enactment in 1913, the Commission Provision was applied by this Court to preclude <u>all</u> claims based on oral and/or unsigned agreements, contracts or promises to pay a commission without exception, without limitation, and as a matter of course. The following cases demonstrate the staunch manner in which this Court applied the statute of frauds to preclude claims for commissions.

- *Paul v Graham,* 193 Mich 447; 160 NW 616 (1916) (Under Comp Laws 1897, §9515, subd 5, as amended by Pub Acts 1913, No. 238, providing that every agreement or promise to pay any commission for or upon sale of any interest in realty shall be writing, etc., no recovery can be had unless agreement therefor is in writing).

- *Slocum v Smith,* 195 Mich 281; 161 NW 830 (1917) (Under Pub Acts 1913, No. 238, §2, commissions which purchaser of land agreed to pay broker cannot be recovered unless contract be in writing).

- *Smith v Starke*, 196 Mich 311; 162 NW 998 (1917) (Pub Acts 1913, No. 238, requiring agreements to pay commission on sale of land to be in writing, *held* to apply to agreement by broker to pay plaintiff for procuring purchaser).

- *Purdy v Law*, 212 Mich 275; 180 NW 251 (1920) (Action cannot be maintained on parol contract for exchange of land reciting commission agreement between parties).

- *Renaud v Moon*, 227 Mich 547; 198 NW 895 (1924) (Under Comp Laws 1915, §11981, an agreement for division of commission for sale of land, to be valid, must be in writing).

- *Fleming v James S Holden Co*, 200 Mich 519; 166 NW 1042 (1918) (As agreement to pay broker's commission for leasing building is required by Pub Acts 1913, No. 238, §2, subd 5, to be evidenced by writing).

The Court of Appeals adopted this approach as well. For example, in *Gustafson v Bud Clark, Inc*, 5 Mich App 118; 145 NW2d 858 (1966), the Court of Appeals held:

> This Court must determine whether the oral agreement to pay the broker for services rendered to a prospective buyer is unenforceable in accordance with the provisions of the statute of frauds.
>
> This case is controlled by *Slocum v Smith* (1917), 195 Mich 281, 282, 283; 161 NW 830, which held:
>
> > While it is true, as counsel say, that a purchase is not a sale nor a sale a purchase, it is equally true that there cannot be a purchase without a sale, nor a sale without a purchase. The history of the reasons leading up to this legislation is persuasive that the law was intended to apply to an agreement for a purchase as well as a sale because one is a necessary complement of the other. Both are clearly within the mischief which was intended to be remedied by the legislature, and we

> think a reasonable and liberal construction of the statute will make it apply to an agreement for a purchase as well as to a sale of real estate.

Id. at 119-120. Similarly, in *Judy v Lentz*, 6 Mich App 511; 149 NW2d 478 (1967), the Court of Appeals held that the statute of frauds precluded recovery of a commission even where the plaintiff had fully performed and the defendant had partially performed through partial payment of the commission. And, in *Aetna Mtg Co v Dembs*, 13 Mich App 686; 164 NW2d 771 (1968), the Court of Appeals affirmed the trial court's dismissal of an action based upon an alleged oral agreement for a commission for obtaining a mortgage, quoting 12 CJS Brokers §62, pp 141-142 as follows:

> Under an applicable statute requiring an agreement, authorizing or employing an agent or broker to purchase or sell real estate for a commission or other compensation, to be in writing and providing that, if it is not in writing, it shall be invalid or void, or that no action shall be brought thereon, a broker is not entitled to commissions unless the contract under which he acts is in writing. (*Mead v Rehm* (1932), 256 Mich 488; 239 NW 858; *Morris v O'Neill* (1927), 239 Mich 663; 215 NW 8; *Wilcox v Dyer-Jenison-Barry Land Co* (1921), 217 Mich 35; 185 NW 776; *Purdy v Law* (1920), 212 Mich 275; 180 NW 251; *Smith v Starke* (1917), 196 Mich 311; 162 NW 998; *Slocum v Smith* (1917), 195 Mich 281; 161 NW 830; *Paul v Graham* (1916), 193 Mich 447; 160 NW 616.)

Id. at 691.

As a result of this strict application of the statute of frauds by the appellate courts of this State, theories of recovery designed to circumvent the Commission Provision of the statute of frauds were invariably disallowed. For example, as early as 1916, the theory of quantum meruit was advanced to recover on a commission agreement otherwise barred by the statute of frauds.

This Court declined to allow recovery based on a theory of quantum meruit reasoning that "the exception would soon swallow the rule." This Court stated:

> Plaintiff takes the further ground that if the agreement shall be adjudged to be within the statute, then he is entitled to have the judgment affirmed under his count on the quantum meruit. To sustain that count he showed by competent testimony what the value of plaintiff's services was for selling the tracts. It has been the rule of this court to permit recoveries for services actually performed under contracts void under the statute of frauds, either at the contract price or under a quantum meruit. *Fuller v Rice*, 52 Mich 435; 18 NW 204; *Moore v Nason*, 48 Mich 300; 12 NW 162; *Smith v Mfg Co*, 175 Mich 371; 141 NW 563; *Smith v Piano Co*, 185 Mich 313; 151 NW 1025. **If this rule is to be made applicable to this section of the statute of frauds, it would practically nullify the effect of the statute.** Demands for commissions by real estate brokers are not usually made or pressed until the contract is performed. This being so, a recovery could be had, in nearly every instance, either at the contract price or under the quantum meruit. **In order to give the act the effect which the Legislature evidently intended it should have, we have decided to hold that no recovery can be had under this section unless the agreement therefor is in writing.** This is in accord with the holding of other courts which have construed similar statutes. *Leimbach v Regner*, 70 NJ Law, 608; 57 Atl 138; *Blair v Austin*, 71 Neb 401; 98 NW 1040; *McCarthy v Loupe*, 62 Cal 299.

Paul, 193 Mich at 451 (emphasis supplied).

Since its 1916 opinion in *Paul*, this Court has, time and time again, affirmed the dismissal of quantum meruit claims designed to evade the statute of frauds. In *Smith*, this Court wrote:

> **Without qualification**, [the Legislature] declared void 'every agreement . . . to pay any commission.' **The Legislature having failed to use the words of limitation, we cannot add them by judicial construction.** Where the legislative expressions are obscure, the courts may construe a statute, giving a reasonable and sensible interpretation thereto, but where the statute is plain and unambiguous in its terms, its construction is not for the courts; the courts have nothing to do but obey it. *In re Klein's Estate*, 152 Mich 420; 116 NW 394.

Smith, 196 Mich at 315 (emphasis supplied). See also, *Slocum*, 195 Mich at 286 (Where a contract for payment of commissions for effecting purchase of land was not in writing, and hence unenforceable under Pub Acts 1913, No. 238, broker cannot recover on quantum meruit for service performed).

More recently, in *Ekelman v Freeman*, 350 Mich 665; 87 NW2d 157 (1957), the plaintiff brought an action to recover for services allegedly rendered in procuring a purchaser for real estate. This Court held that the statute of frauds, requiring that every agreement, contract and promise to pay a commission for the sale of real estate be in writing and signed, precluded recovery by the broker under a theory of quantum meruit since any such oral agreement is void. *Id.* at 667-670. This Court explained:

> **Acceptance of the theory that recovery may be had on the basis of an implied contract in a case like the instant controversy would, in effect, nullify the statute. It would allow recovery in practically all such cases where, as here, no claim for a commission is, or can be, made until the services have been fully performed.** Such result would defeat the attempt of the legislature to remedy the situation giving rise to the amendment. The fact that defendants paid plaintiff $300 in December, 1955, does not alter the situation. Liability to make additional payments was not thereby created.

Id. at 671 (emphasis supplied).

The Court in *Ekelman* relied on this Court's prior opinion in *Mead v Rehm,* 256 Mich 488; 239 NW 858 (1932). In *Mead*, this Court found an agreement to pay a commission void where it was not signed by the party to be charged but, rather, by that party's alleged agent. This Court's justification for its ruling was related as follows:

> While the statute does not expressly state that one assuming to exclude the contract for another must have written authority to do so, yet it does state that he must be lawfully authorized to sign the name

> of another. This agreement was not signed by John and Grace Rehm, neither did George Rehm sign their names thereto. **If John Rehm may be held liable under the claimed verbal authority, then the evil the statute was intended to prevent will be present, and one who cannot be held liable on a verbal promise to pay a commission would be worse off than before the statute, for his liability would depend upon the promise of one asserting verbal authorization.** A verbal agreement to pay the commission is rendered absolutely void by the statute, and there can be no recovery on quantum meruit, even though the service was rendered and accepted.

Mead, 256 Mich at 490 (emphasis supplied).

Similarly, claims of specific performance designed to circumvent the statute of frauds have been rejected by this Court. In *Bradley v May*, 214 Mich 194; 183 NW 64 (1921), plaintiffs sought specific performance of an alleged oral agreement for defendants to pay them a commission. Defendants claimed that the alleged agreement was void under the statute of frauds. *Id.* at 195. Relying on its earlier decision in *Paul*, this Court held that plaintiff could not avoid the statute of frauds by pleading an equitable claim of specific performance, stating:

> "But the rule which requires a plaintiff to show a present subsisting right of action is equally regarded in equity as at law. Although a court of equity will supply a remedy where none exists at law, yet it will not create a right of action where the law gives none." Waterman on Specific Performance, 16.

Id. at 198-199. See also, *Tri-Mount/Preserves Bldg Co v TCF Nat'l Bank*, unpublished opinion per curiam of the Court of Appeals, issued Oct 4, 2005 (Docket No. 254077); 2005 WL 2445461, wherein the Court of Appeals, relying on *Bradley, supra*, held that plaintiff's claim for specific performance of an alleged oral commission agreement was barred by the statute of frauds. A copy of the *Tri-Mount/Preserves* opinion is attached as Exhibit B.

In short, historically, this Court and the Court of Appeals, have applied the Commission Provision of the statute of frauds, without exception. The logic by which this Court did so, as expressed above, is both consistent and sound – exceptions swallow the rule and statutes are applied as written. This same logic applies where a claimant seeks to evade the statute of frauds by pleading promissory estoppel to recover on a claim for commission.

2. Promissory Estoppel Claims have Properly been Disallowed as being Barred by Operation of the Statute of Frauds in Cases Involving the Sale of Real Estate

The statute of frauds also bars claims involving oral and/or unsigned contracts for the sale of real estate. MCL 566.108; MCL 566.106. These sections of the statute of frauds employ language similar to the section at issue here. MCL 566.108 provides, in part:

> Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing.

MCL 566.108. Similarly, MCL 566.106 provides:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

MCL 566.106 (collectively, the "Real Estate Provisions").

These statutory provisions do not expressly apply to "promises." Nonetheless, years ago, a Michigan federal court, applying Michigan law, found that these provisions precluded a claim for

promissory estoppel. In *Hazime v Martin Oil Co of Indiana*, 792 F Supp 1067 (ED Mich, 1992), a case involving an alleged oral agreement for the sale of real estate, the federal court stated:

> A survey of Michigan cases involving doctrine of promissory estoppel reveals that there has never been a decision that addresses whether it may be applied to a statute of frauds case, like this one, involving a real estate transaction. Nevertheless, the Court is satisfied that if the Michigan Supreme Court looked at the issue today, it would rule that, under the circumstances of this case, the doctrine of promissory estoppel may not be applied to a statute of frauds case involving the sale of real estate.

Id. at 1069. The rationale employed by the federal court was as follows:

> The statute of fraud[s] is . . . necessary "to ensure that transactions involving a transfer of realty interests are commemorated with sufficient solemnity. A signed writing provides greater assurance that the parties and the public can reliably know when such a transactions occurs. It supports the public policy favoring clarity in determining real estate interests and discourages indefinite or fraudulent claims about such interests." *North Coast Cookies, Inc v Sweet Temptations, Inc,* 16 Ohio App 3d 342, 348; 476 NE2d 388 (1984).

Id. at 1069, quoting *Seale v Citizens S&L Ass'n*, 806 F2d 99, 104 (CA 6, 1986) (emphasis supplied).

The *Hazime* opinion was followed by the Michigan Court of Appeals in *Tri-Mount/Preserves, supra*. There, the Court of Appeals stated:

> Plaintiffs have not cited any authority in support of their position that promissory estoppel can be applied to enforce an unwritten contract involving an interest in real property, in avoidance of the statute of frauds. A party's failure to cite authority in support of its position waives the issue on appeal. *People v Weathersby,* 204 Mich App 98, 113; 514 NW2d 493 (1994). Further, it does not appear that Michigan law permits application of promissory estoppel in this context. *Hazime v Martine Oil of Indiana, Inc,* 792 F Supp 1067, 1069 (ED Mich, 1992). We therefore conclude that plaintiffs cannot rely on promissory estoppel to avoid the statute of frauds.

Tri-Mount *3, Exhibit B.

Most recently, the US District Court, Eastern District, cited both *Hazime* and *Tri-Mount/Preserves*, as well as the *Crown Tech Park* case discussed *supra*, as supporting its dismissal of plaintiffs' promissory estoppel claim for the sale of real estate pursuant to the statute of frauds. *McCann v US Bank, NA,* 873 F Supp 2d 823, 834 (ED Mich, 2012). The Court noted:

> Moreover, as the Michigan Court of Appeals has pointedly observed, promissory estoppel is a judicially-created doctrine. Applying it to circumvent the statute of frauds would be "contrary to well-founded principles of statutory construction and is inconsistent with traditional notions of the separation of powers between the judicial and legislative branches of government." *Crown Tech Park v D & N Bank, FSB,* 242 Mich App 538; 619 NW2d 66, 71 n 4 (Mich Ct App 2000) (citing Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 14-29 (1997)). That is, the judiciary is obliged to defer to the policy choices of the legislature:
>
> > Promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions. Unlike a traditional common-law contract claim or defense, the statute of frauds is legislatively mandated. Thus, such contracts must be reduced to writing . . . . The Michigan Legislature has determined that, for those contracts specifically identified in the statute of frauds, it is important to provide certainty and to avoid controversy over the terms of alleged contracts.

Id. at 835 (citations omitted).

According to this Court, the legislative purpose for enacting the Commission Provision of the statute of frauds was:

> to protect the owners of real estate against unfounded claims based on alleged oral agreements for the payment of commissions for services in procuring sales. 12 CJS Brokers §62, p 142; *Thompson v Carey's Real Estate*, 335 Mich 474; 56 NW2d 255; *Summers v Hoffman*, 341 Mich 686, 695; 69 NW2d 198; 48 ALR2d 1033.

Ekelman, 350 Mich at 667 (emphasis supplied). These same policy concerns motivated the enactment of the Real Estate Provisions – to prevent fraudulent, unfounded claims. *Farah v Nickola*, 352 Mich 513, 519; 90 NW2d 464 (1958) (Statute of frauds exists for purpose of preventing fraud or opportunity for fraud, not as an instrumentality to be used in aid of fraud or as a stumbling block in path of justice). The legislative intent and purpose for enacting both the Real Estate Provisions and the Commission Provision of the statute of frauds is the same. Accordingly, both provisions should be interpreted and applied the same. That is, the Commission Provision, like the provisions relating to the sale of real estate, should be applied without any exception for claims for promissory estoppel.[4]

3. This Court's Opinion in *Opdyke* Does Not, *Ipso Facto*, Require that a Promissory Estoppel Claim Survive a Summary Disposition Motion Based on the Statute of Frauds

According to the Court of Appeals, this Court's decision in *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354; 320 NW2d 836 (1982) created and upheld the promissory estoppel exception to the statute of frauds – precedent which the Court was bound to follow. COA Opinion, p 3, Exhibit A. The Court of Appeals stated:

> Regardless of the wisdom of using a judicially created exception to a statute, we must apply it. The Michigan Supreme Court created and has upheld the exception. See *Opdyke Investment Co,* 413 Mich at 365. "This Court is bound to follow decisions of our Supreme Court." *People v Strickland,* 293 Mich App 393, 402; 810 NW2d 660 (2011). It is a fundamental principle that only the Michigan Supreme Court has the authority to overrule one of its

[4] Further, the argument can be made that there is even more support for prohibiting promissory estoppel claims as an exception to the Commission Provision than the Real Estate Provisions since the Commission Provision expressly encompasses "promises," whereas the Real Estate Provisions do not.

> prior decisions. *Paige v City of Sterling Hts,* 476 Mich 495; 720 NW2d 219 (2006). We do not have the power to overrule the Supreme Court's determination that promissory estoppel is an exception to the statute of frauds.

COA Opinion, pp 3-4, Exhibit A (footnote omitted). Arguably, however, *Opdyke* need not be read so broadly such that, as cautioned by the Court of Appeals, the doctrine of promissory estoppel "subsumes the statute of frauds and makes the statute of frauds irrelevant." COA Opinion, p 4, n 2, Exhibit A.

At issue in *Opdyke* was an alleged contract to make a contract and the legal sufficiency of the written evidence vis-á-vis the statute of frauds. *Opdyke*, 413 Mich at 359. More specifically, this Court examined the question of whether parol evidence may be used to supplement written evidence for statute of frauds compliance purposes, answering that question affirmatively. *Id.* at 367. Ultimately, this Court concluded that the evidence sufficiently met the requirements of the applicable statutes of frauds. *Id.* at 369. As to plaintiff's promissory estoppel claim, this Court stated:

> Finally, to the extent that plaintiff's complaint states a cause of action based on "promissory estoppel", accelerated judgment was inappropriate. This Court acknowledged this theory of recovery in *The Vogue v Shopping Centers, Inc* (*After Remand*), 402 Mich 546; 266 NW2d 148 (1978), without adopting any particular version of promissory estoppel. *See, e.g.,* 1 Restatement Contracts 2d, § 90, p 242; 1A Corbin, Contracts, §§204-205, pp 232-250; *In re Timko Estate,* 51 Mich App 662; 215 NW2d 750 (1974). In this case, disputed questions of fact exist as to whether a noncontractual promise was made by the defendants and reasonably relied upon by the plaintiff. **Since the statute of frauds only applies to certain "contracts", recovery based on a noncontractual promise falls outside the scope of the statute of frauds.** The plaintiff's alternate theory of promissory estoppel is sufficiently pleaded and supported to survive the defendants' motion for accelerated judgment based on the statute of frauds.

Id. at 369-370 (emphasis supplied).

The *Vogue* case cited by this Court in *Opdyke* was the case in which this Court adopted promissory estoppel as a viable theory of recovery under Michigan law. *The Vogue v Shopping Centers, Inc* (*After Remand*), 402 Mich 546; 266 NW2d 148 (1978). However, the *Vogue* case did not involve the statute of frauds. *Id.* Therefore, this Court was "breaking new ground" in *Opdyke* when it discussed promissory estoppel in the context of the statute of frauds. A careful reading of *Opdyke*, however, does not indicate that this Court adopted promissory estoppel as a wholesale "exception" to the statute of frauds but, rather, as a claim which, under certain facts, merely does not implicate application of the statute of frauds.

As stated in the quote above, the *Opdyke* Court allowed the plaintiff therein to proceed with its promissory estoppel claim because the alleged promise that formed the basis of that claim was a "noncontractual promise" that fell "outside the scope of the statute of frauds." *Opdyke,* 413 Mich at 370. This Court did not elaborate on the nature or substance of the "noncontractual promise." However, the language quoted above confirms that the "noncontractual promise" there at issue was of a nature and substance so as to be outside the categories of contracts subject to the statute of frauds. Accordingly, the breadth of *Opdyke* is not an all-encompassing validation of all promissory estoppel claims as exceptions to the statute of frauds. Rather, *Opdyke* provides only a class of cases in which promissory estoppel claims may survive a statute of frauds challenge – specifically, where the alleged promise is separate and distinct from the agreement, contract or promise that is void under the statute of frauds. Accordingly, under *Opdyke*, where the promise upon which a plaintiff relies to overcome a statute of frauds defense is precisely the same as the promise presented as

grounds for their separate promissory estoppel claim, the promissory estoppel claim should be dismissed along with those claims that are barred by the statute of frauds.[5]

D. A Restrictive Interpretation of the Statute of Frauds is Consistent with Well-Established Principles of Michigan Law

1. Plaintiffs Failed to Plead a Claim for Promissory Estoppel

A narrow application of the doctrine of promissory estoppel is consistent with the law of this State. For example, the Court of Appeals has repeatedly stated that the doctrine of promissory estoppel is "cautiously applied" and, even then, "only where the facts are unquestionable and the wrong to be prevented undoubted." *Barber v SMH (US),* Inc, 202 Mich App 366, 376; 509 NW2d 791 (1993), citing *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). The alleged promise must be "clear and definite." *Id.* Therefore, according to this Court, where the alleged promise is ambiguous, a promissory estoppel claim is properly dismissed. *State Bank of Standish v Curry*, 442 Mich 76, 96-98; 500 NW2d 104 (1993). Where there is no specificity to the promise, any award of damages would be entirely speculative. *McMath v Ford Motor Co*, 77 Mich App 721, 726; 259 NW2d 140 (1977). Thus, where the pleadings disclose no definite and clear promise, the promissory estoppel claim should be dismissed. *Id.*

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[5] Alternatively, assuming but denying that the *Opdyke* case can be interpreted so as to establish promissory estoppel as a broad and blanket "exception" to the statute of frauds, application of the *Opdyke* decision should be limited to those provisions of the statute of frauds primarily at issue therein. The Commission Provision of the statute of frauds renders void "agreement[s], contract[s], [and] promise[s]." By contrast, the primary provision of the statute of frauds at issue in *Opdyke*, MCL 566.108, expressly applies only to "contract[s]." As such, that provision arguably does not even apply to promises. *Opdyke*, therefore, may be distinguished from this case and the Court of Appeals erred in concluding otherwise.

> Because promissory estoppel is an exception to general contract principles in that it permits enforcement of a promise that may have no consideration, the general rule is:
>
> > "In order that a statement or representation may be relied upon as creating an estoppel, its language must be clear and plain, or it must be clear and reasonably certain in its intendment, since estoppels must be certain and are not to be taken or sustained on mere argument or doubtful inference." 28 Am Jur 2d, Estoppel and Waiver, §45, p 654.
>
> Hence, "a promise must be definite and clear." *McMath v Ford Motor Co,* 77 Mich App 721, 726; 259 NW2d 140 (1977).

State Bank of Standish, 442 Mich at 96 (footnote omitted). In fact, a definite and clear promise is the "sine qua non" of the theory of promissory estoppel. *Marrero*, 200 Mich App at 442.

Here, contrary to Plaintiffs' claims, the phrase "broker protected," upon which they based their promissory estoppel claim is neither a "term of art" in the Realtor® world nor a concept, theory or promise found under Michigan law. "Broker protected" is not a clear promise to pay a commission. "Broker protected" is not a definite promise to pay a commission. Plaintiffs have failed to plead the sine qua non of a promissory estoppel claim. Plaintiffs' pleading of mere legal conclusions on this issue is insufficient to state a cause of action. *Kyocera*, 313 Mich App at 445. The Circuit Court correctly dismissed Plaintiffs' promissory estoppel claim and that decision should be reinstated by this Court.

2. Equitable Principles Bar Plaintiffs' Claim for Promissory Estoppel

While a promissory estoppel claim is grounded in contract law, it comprises an equitable doctrine. *Huhtala v Travelers Ins Co*, 401 Mich 118, 133; 257 NW2d 640 (1977); *Martin v East Lansing Sch Dist*, 193 Mich App 166, 178; 483 NW2d 656 (1992). Indeed, a critical element of a promissory estoppel claim is that circumstances require enforcement of the promise

"if injustice is to be avoided." *Zaremba Equip, Inc v Harco Nat'l Ins Co,* 280 Mich App 16, 41; 761 NW2d 151 (2008). Again,

> [t]he doctrine of estoppel should be applied only where the facts are unquestionable and the wrong to be prevented undoubted. *Marreroi, supra*, 200 Mich App at 442; 505 NW2d 275.

Barber, 202 Mich App at 376.

Black-letter Michigan law requires that a party seeking equity "must do equity." *Rose v Nat'l Auction Group, Inc,* 466 Mich 453, 461; 646 NW2d 455 (2002). Therein, this Court stated:

> Indeed, the maxim that one "who comes into equity must come with clean hands" is "the expression of one of the elementary and fundamental conceptions of equity jurisprudence." 2 Pomeroy's Equity Jurisprudence, ch I, §397, p 90, §398, p 92 (1941). The courts of this state have held similarly. Justice Cooley wrote for a unanimous Court in *Rust v Conrad*, 47 Mich 449, 454; 11 NW 265 (1882):
>
> > [I]f there are any indications of overreaching or unfairness on [an equity plaintiff's] part, the court will refuse to entertain his case, and turn him over to the usual remedies.

Id. In keeping with these equitable principles, at least one Michigan federal Court has held: "[i]f the doctrine of promissory estoppel is to be applied to circumvent the statute of frauds, it should be applied only to avoid the perpetration of a fraud." *Indus Maxifreight Servs LLC v Tenneco Auto Operating Co, Inc*, 182 F Supp 2d 630 (WD Mich, 2002).

Here, the facts show devious, if not nefarious, conduct on the part of Plaintiffs to entangle themselves in a real estate transaction in which both parties (the buyer and the seller) had expressly declined their offer of representation and participation. The facts do not demonstrate a need to enforce an alleged promise to pay a commission to "avoid injustice." Therefore, Plaintiffs have again

failed to plead an element of a promissory estoppel claim. The Circuit Court correctly dismissed Plaintiffs' promissory estoppel claim and that decision should be reinstated by this Court.

E. Public Policy Considerations Weigh in Favor of Reversing the Opinion of the Court of Appeals and Reinstating the Decision of the Circuit Court

The 47 local boards of the Association provide multiple listing services throughout the State of Michigan. A Multiple Listing Service ("MLS") is the primary vehicle by which sellers of residential real estate market their property to buyers. The strict application of the Real Estate Provisions of the statute of frauds is the bedrock upon which MLSs efficiently operate in the State of Michigan and eliminates the risks to sellers of potential payment of more than one commission to competing brokers.

If a seller wishes to place his or her property in a MLS, he or she must enter into a listing agreement with a Realtor® broker. The listing agreement specifically obligates the seller to pay the Realtor® broker a commission upon the Realtor® broker's performance of the terms of the listing agreement and the successful sale of a seller's property. Upon obtaining a listing, the Realtor® broker submits the listing to one or more MLSs.[6] In submitting the listing to the MLS, the Realtor® broker offers cooperation and compensation to all other Realtors® participating in the MLS. Typically, the listing Realtor® broker will offer compensation in some percentage of the purchase price to other cooperating Realtor® brokers who are participants in the MLS. The terms of the listing agreement authorize the listing Realtor® broker to offer such compensation to cooperating Realtors®

[6] In some instances, a listing submitted to an MLS will end up being displayed on multiple MLSs maintained by multiple local boards. For example, a listing submitted to the Lenawee County Association of Realtors® will be displayed on MLSs maintained by eighteen (18) different boards. These boards share and display listings through the Great Lakes Repository which displays the listings to the public and at least 17,000 Realtors®.

to induce them to procure a buyer to purchase the seller's property. This unilateral offer of compensation by the Realtor® listing broker is accepted by a cooperating Realtor® when he or she procures a buyer who makes an offer which is accepted by a seller and which ultimately results in a closing.

During the course of a listing, in most cases the seller's property will be shown by numerous Realtors® to many potential buyers. In some instances, potential buyers may be shown the same property by more than one Realtor®. Further, various offers may be submitted by Realtors® on behalf of prospective buyers during the course of a listing agreement which result in interaction and negotiations between a seller, listing Realtor® broker, Realtor® and prospective buyer.

In some instances, more than one Realtor® claims to have procured a buyer for a specific listed property. Each Realtor® claims entitlement to the compensation offered by the listing Realtor® broker through the MLS. These competing claims pose no risk to the seller or the buyer with respect to traditional claim for compensation. The competing Realtors® are required by the Code of Ethics of the National Association of Realtors® to arbitrate all such disputes pursuant to the National Association of Realtors® Code of Ethics and Arbitration Manual, as amended to conform with Michigan Law (the "Manual"). Article 17 provides in pertinent part:

> In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between Realtors® (principals) associated with different firms, arising out of their relationship as Realtors®, the Realtors® shall mediate the dispute if the Board requires its members to mediate. If the dispute is not resolved through mediation, or if mediation is not required, Realtors® shall submit the dispute to arbitration in accordance with the policies of the Board rather than litigate the matter.

In addition, all Realtors® upon applying for membership is an association of Realtors® must agree to abide by the Manual and to binding arbitration of all such disputes.

The application of promissory estoppel to Real Estate Provisions of the statute of frauds potentially subjects sellers of residential real estate in Michigan to claims for more than one commission. Again, the seller enters into a listing agreement with a Realtor® broker which specifically obligates the seller to pay a Realtor® broker a commission in satisfaction of the Real Estate Provisions of the statute of frauds. The Manual precludes any other Realtor® from entering into a listing agreement with a seller when the seller is already subject to an additional listing agreement. Article 16 of the Manual provides:

> Realtors® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other Realtors® have with clients.

In sum, the system established through the MLS effectively protects sellers (and buyers when entering into buyer's agency agreements that provided for compensation of Realtors® acting as a buyer's agent) from defending and/or paying claims for commissions for which there is no written agreement. Again, it is premised upon the strict application of the Real Estate Provisions of the statute of frauds.

In addition, the Michigan legislature has also addressed the application of Real Estate Provisions of the statute of frauds to commercial real estate. In the Commercial Real Estate Broker's Lien Act, MCL 570.581 *et seq* (the "Act") real estate brokers engaged in the sale of commercial real estate in the State of Michigan were granted the right to place a lien on properties to secure payment of commissions which they claim were owed them. Specifically, commercial real estate brokers are required to file a claim of lien in a form set forth in MCL 570.584(10). In order to file a claim of

lien under the Act, a commercial real estate broker is required to swear to the following in his or her lien claim:

> 2. On _____, the broker-claimant entered into a written agreement with the (owner) (buyer) obligating the (owner) (buyer) to pay a commission to the broker-claimant. A legible copy of the agreement is attached as Exhibit B.

MCL 570.584(10). The Michigan Legislature, in adopting the Act, assumed strict application of the Real Estate Provisions of the statute of frauds.

In sum, the continued operation of an efficient and orderly market for the sale and purchase of real estate is dependent upon the strict application of the Real Estate Provisions of the statute of frauds.

IV. CONCLUSION/RELIEF REQUESTED

For all the foregoing reasons, the Association respectfully requests that this Court grant the Association leave to file this Amicus Curiae Brief in support of the Application for Leave to Appeal of Defendant/Appellant, grant the Application, reverse the Opinion of the Court of Appeals and reinstate the decision of the Circuit Court, granting summary disposition in favor of Howell on Plaintiffs' claim for promissory estoppel.

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LIST OF EXHIBITS
TO MICHIGAN REALTORS'® AMICUS CURIAE BRIEF
IN SUPPORT OF APPELLANT'S APPLICATION

A. COA Opinion, pp 3-4

B. *Tri-Mount/Preserves Bldg Co v TCF Nat'l Bank*, unpublished opinion per curiam of the Court of Appeals, issued Oct 4, 2005 (Docket No. 254077); 2005 WL 2445461